



DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 298

[Docket Number MARAD-2023-0086]

RIN 2133-AB98

Amendment to the Federal Ship Financing Program Regulations; Financial Requirements

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Final rule.

SUMMARY: This document serves to inform interested parties and the public that the Maritime Administration (MARAD) is amending its regulations implementing the Federal Ship Financing Program's (Title XI Program) financial requirements. This action is necessary to implement statutory changes and update the existing financial requirements imposed on Title XI Program obligors to align with more up-to-date vessel financing and federal credit best practices.

DATES: This rule will be effective [*insert date 30 days after date of publication in the Federal Register*].

FOR FURTHER INFORMATION CONTACT: David M. Gilmore, Director, Office of Marine Financing, at (202) 366-5737, or via e-mail at marinefinancing@dot.gov. You may send mail to Mr. Gilmore at Department of Transportation, Maritime Administration, Office of Marine Financing, 1200 New Jersey Avenue, SE, Washington, DC 20590. If you have questions on viewing the Docket, call Docket Operations, telephone: (800) 647-5527.

SUPPLEMENTARY INFORMATION:

Background

The Secretary of Transportation, through MARAD, is authorized to provide guarantees of debt (obligation guarantees) to finance all types of vessel construction and shipyard modernization and improvement, except for fishing vessels. The Title XI Program is a loan

guarantee program, administered by MARAD, which was established under Title XI of the Merchant Marine Act, 1936, Public Law 74-835, codified at 46 U.S.C. Chapter 537, as amended (the “Act”). Title XI provides for the full faith and credit of the United States, acting by and through the Maritime Administrator, for the payment of debt obligations for: (1) U.S. shipowners for the purpose of financing or refinancing U.S. flag vessels constructed, reconstructed, or reconditioned in U.S. shipyards; and (2) U.S. shipyards for the purpose of financing advanced shipbuilding technology and modern shipbuilding technology of a privately-owned shipyard facility located in the U.S. As the Title XI Program guarantees full payment of the obligation’s unpaid principal and interest in the event of a default by the borrower, both the statute and regulations contain several criteria and requirements intended to reduce the risk of a loan default. Though the Title XI Program regulations have been amended over the years, the current financial requirements and limitations remain substantially the same as when MARAD introduced them in 1978. As lending practices have evolved, MARAD’s regulatory standards have not changed to reflect modern lending practices for vessel financing. For example, when the regulations were implemented, certain leases were not included as an expense under generally accepted accounting principles (GAAP), but today GAAP requires that all leases be included as an expense. Today, retained earnings are also expected to be included in any calculation of equity or net worth pursuant to GAAP. Accordingly, the modifications to the regulations will eliminate confusion and align the Title XI Program regulations with modern accounting standards.

Prior to execution of a guarantee, MARAD is bound by statute to, among other things, make determinations of economic soundness of the project and the financial and operating capability of the applicant. To that end, the Title XI regulations currently require each borrower, and operator if applicable, to have and maintain: (1) working capital of at least \$1; (2) at least 90 percent of its equity as shown on the last audited balance sheet; and (3) long-term debt not to exceed twice its equity. By this amendment, MARAD is modernizing its financial review process by removing static financial covenants and loan thresholds and replacing them with a

review and evaluation of the creditworthiness of each borrower based on revenue metrics based on federal credit and maritime lending best practices. The use of these revenue metrics is intended to improve the quality of MARAD financial requirements applied to new borrowers. As part of its regular programmatic evaluation process, MARAD frequently seeks feedback from potential applicants and borrowers on its processes. Potential applicants have advised MARAD that the challenges caused by the regulatory requirements are a reason why they will not use the program. Borrowers also have cited the incompatibility of Title XI debt financial covenants with the other lender covenants as an obstacle in the prompt processing and approval of loan guarantee applications.

The “National Defense Authorization Act for Fiscal Year 2020,” (Pub. L. 116-92; December 20, 2019) (“NDAA 2020”) established the Federal Financing Bank as the “preferred lender” for the Title XI Program. Additionally, the NDAA 2020 directed MARAD to periodically review Title XI application procedures and documents to assure they “meet current commercial best practices to the extent permitted by law.” The 2020 NDAA also provided that MARAD establish a process for expedited consideration of low-risk applications which would “utilize, to the extent practicable, relevant Federal and industry best practices found in the maritime and shipbuilding industries.” As a result, MARAD identified best practices from federal credit programs that make loans and obligation guarantees similar to the Title XI Program. MARAD considered a review of federal credit practices that identified the Title XI Program was the only program with regulatorily-imposed financial covenants and thresholds.¹ This deviation from federal credit best practices was highlighted as a significant hinderance to the Title XI Program’s ability to tailor the terms of credit assistance to address the characteristics of a specific project.

¹ U.S. Department of Transportation, Maritime Administration, *Federal Credit and Maritime Lending Industry Best Practices*, June 2020. Available at <https://www.maritime.dot.gov/grants/title-xi/statute-regulations-and-guidance>.

Restrictions on the flexibility of the program limit the program's ability to succeed. Reliance on the current static metrics and limited amortization requirements prevent the Title XI Program from adjusting its financial terms and conditions and debt amortization when best credit practices would recommend otherwise. The amendments made to the regulation under this final rule are intended to attract a higher volume of high-quality applicants and mitigate risk to the U.S. Government.

Moreover, with the implementation of the Federal Financing Bank as the preferred lender for Title XI obligation guarantees, there is no longer a need for the strict uniformity in the regulatory structure of the guaranteed obligations. Previously, Title XI guaranteed debt was marketed to the public through investment banks. This created a need for uniformity to encourage the purchase of the debt by entities not familiar with maritime financings and to allow for easier resale by a debt purchaser to a third-party at a future date. The expectation of uniformity by the market limited the payment schedule options available for Title XI Program participants in circumstances where it may have been in the U.S. Government's best interest to structure the debt differently to mitigate risk.

Due to the length of time since the regulations were last updated, the availability of modern financial requirements of similar federal programs, the evolving maritime environment, changes to federal credit and maritime lending best practices, and updates to the Title XI statute, MARAD is amending its regulations. These amendments include permitting MARAD to use financial requirements, consistent with federal credit and maritime lending best practices for entities having a similar credit rating that MARAD determines are necessary and appropriate to protect the interest of the United States. The amendments will also allow MARAD to use alternative methods of amortization, other than level principal or level debt payment, when an independent financial advisor approved by MARAD conducts independent analysis and review and demonstrates that such other method is in the best interests of the United States.

The final rule will update the lending parameters in the current regulations, which no longer best achieve the intended purpose of minimizing the risk of Title XI Program defaults and will better align the lending practices to reflect federal credit and maritime lending best practices. Additionally, MARAD expects that the amended regulations will reduce the economic burden on applicants in complying with Title XI Program requirements that are inconsistent with other lending instruments. MARAD also expects that the updated lending parameters will encourage the construction of vessels in United States shipyards which otherwise would not meet the current constrained Title XI Program financial requirements.

Response to Comments

In developing this rule, MARAD published a notice of proposed rulemaking in the *Federal Register* on April 25, 2023 (88 FR 24962) with a sixty-day comment period which closed on June 26, 2023. MARAD received one comment from Argent Group, Ltd. a financial services firm specializing in the Jones Act maritime industry.

The commenter expressed concern that the proposed modifications to the regulations for both the qualifying requirements of a company to close on the Title XI Program financing documents as well as the continuing financial compliance requirements for a company to maintain throughout the time the Title XI Program financing documents are in effect.

The commenter proposed a modification to the regulation that was the same for both sections. The commenter noted that the changes to the regulation made it unclear what the financial requirements would be for a company and proposed MARAD maintain substantially similar financial tests as exist in the current regulations except when a company has existing credit agreements then MARAD should apply those financial covenants or ratios.

MARAD does not agree that maintaining the current financial compliance requirements provides clarity as the commenter suggests. The statute has been updated several times since the regulations were last updated. The final rule conforms MARAD creditworthiness review standards with the statute. Additionally, the commenter proposes that MARAD adopt

requirements to provide for an alternative to the existing financial compliance covenants in instances where the company has existing private sector credit agreements. MARAD does not agree. The option to incorporate the financial compliance covenants or ratios of applicable private sector credit agreements already exists in MARAD regulations.

The commenter expressed concern about the proposed modification to the regulation for changes to the amortization schedule of guaranteed obligations requiring independent analysis by a third-party expert. The commenter noted that MARAD regularly retains third party experts and, while MARAD would likely consult third-party experts as part of any adjustment to the amortization schedule of guaranteed obligations, nowhere else in the regulation is there a requirement that MARAD use third-party experts to determine what is in the best interests of the United States Government. MARAD agrees and is removing that requirement from the final rule.

I. Regulatory Analyses and Notices

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

Executive Order 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review) and DOT Regulatory Policies and Procedures.

Under Executive Order (E.O.) 12866, as amended (58 FR 51735, October 4, 1993, 88 FR 21879, April 11, 2023), supplemented by E.O. 13563, as amended (76 FR 3821, January 18, 2011, 88 FR 21879, April 11, 2023) and USDOT policies and procedures, a determination must be made whether a regulatory action is “significant,” and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the order. The order defines “significant regulatory action” as one likely to result in a rule that may: (1) have an annual effect

on the economy of \$200 million or more (adjusted every 3 years by the Administrator of OIRA for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

This rulemaking has been determined to be a non-significant regulatory action under section 3(f) of E.O. 12866 by the Office of Information and Regulatory Affairs (OIRA) within OMB.

Analysis of Benefits and Costs

The Title XI Program guarantees full payment of the obligation's unpaid principal and interest in the event of a default by the borrower. Both the statute and MARAD's implementing regulations also contain several criteria and requirements intended to reduce the risk of a loan default. Though the Title XI Program regulations have been amended over the years, the current financial requirements and limitations remain substantially the same as when they were introduced in 1978. As lending practices have evolved, the regulatory standards have not changed to reflect current lending practices for vessel financing.

Benefits

The major benefits of amending Part 298 will be to: (1) modernize MARAD's financial review process by removing static financial covenants and loan thresholds and replacing them with best practices intended to improve the quality of MARAD financial reviews; and (2) allow

MARAD to examine more indicators of financial health, thus improving MARAD's ability to accurately assess applicants and to better mitigate financial risk to the Government.

Costs

MARAD does not believe that the rulemaking is likely to impose quantifiable or nonquantifiable costs. The primary function of this regulatory change is to modernize MARAD financial review methods and processes, thereby improving MARAD's ability to evaluate applicants.

Analysis of Alternatives

On December 20, 2019, the NDAA 2020 directed MARAD "to utilize, to the extent practicable, relevant Federal and industry best practices found in the maritime and shipbuilding industries." In considering potential alternatives, MARAD reviewed several Federal credit programs that make loans and obligation guarantees similar to the Title XI Program. MARAD considered a review of Federal credit practices that identified the Title XI Program as the only Federal program with regulatorily-imposed financial covenants and thresholds.² The report found that the static regulatory requirements significantly hindered the Title XI Program's ability to tailor the terms of credit assistance to address the characteristics of a specific project. MARAD considered the report's findings in light of its current practices and is in this final rule amending the regulations to conform to the report's findings.

Executive Order 13132 (Federalism)

MARAD has examined the rule pursuant to E.O. 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments, or their representatives is mandated beyond the rulemaking process. The Agency has concluded that the rulemaking would not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The rule will

² U.S. Department of Transportation, Maritime Administration, *Federal Credit and Maritime Lending Industry Best Practices*, June 2020. Available at <https://www.maritime.dot.gov/grants/title-xi/statute-regulations-and-guidance>.

not have “substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.”

Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

MARAD has determined that this rulemaking, in which MARAD proposes to amend its regulations implementing the Title XI Program financial requirements to implement statutory changes and update the existing financial requirements imposed on Title XI Program obligors, will not significantly or uniquely affect the communities of Indian Tribal Governments when analyzed under the principles and criteria contained in E.O. 13175 (Consultation and Coordination with Indian Tribal Governments). Therefore, the funding and consultation requirements of this Executive order do not apply.

Executive Order 12372 (Intergovernmental Review)

The requirements of E.O. 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking, because it would not directly affect the interests of State and local governments.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires MARAD to assess whether this rulemaking would have a significant economic impact on a substantial number of small entities and to minimize any adverse impact. Potential applicants to the Title XI program are vessel owners and operators, as well as shipyard owners. These industries fit under NAICS codes 336611, Ship Building and Repairing and NAICS codes 483111-483212, which cover different types of transportation by vessel and would include vessel owners and operators.³ The SBA defines a small business under NAICS code 36611 as a business with 1,250 employees or less

³ These NAICS codes are 483111/483112 Deep Sea Freight/Passenger Transportation, 483113/483114 Coastal and Great Lakes Freight/Passenger Transportation, and 483211/483212 Inland Water Freight/Passenger Transportation. Navigational Services to Shipping, under NAICS code 488330 may also be applicable. SBA defines a small business under this NAICS code as having an average annual revenue of \$41.5 million or less.

and under NAICS code. The SBA defines small businesses under NAICS codes 483111-483212 as businesses with 500-1,500 employees or less, depending on the specific NAICS code.

The Title XI Program guarantees full payment of the obligation's unpaid principal and interest in the event of a default by the borrower. The program maintains a \$5,000 application fee, a fee that has not increased in 30 years and would remain unchanged by this proposal. MARAD also estimates that the application process currently takes approximately 150 hours, a figure that would also remain unchanged by this proposal. The program provides substantial financial assistance to maritime industry participants, and the changes are intended to eliminate challenges caused by the regulatory requirements, a reason cited by stakeholders as to why they will not use the program. The rule is also intended to make Title XI debt financial covenants compatible with other lender covenants, which stakeholders cited as an obstacle in the prompt processing and approval of loan guarantee applications. MARAD intends for the changes to attract a higher volume of high-quality applicants to the program. Based on the foregoing, MARAD certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities.

Executive Order 12988 (Civil Justice Reform)

E.O. 12988 requires that agencies promulgating new regulations or reviewing existing regulations take steps to minimize litigation, eliminate ambiguity and to reduce burdens on the regulated public. MARAD has reviewed this rulemaking and has determined that this rulemaking action conforms to the applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform,

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 requires Agencies to evaluate whether an Agency action would result in the expenditure by State, local, and Tribal Governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any 1 year, and if so, to take steps to minimize these unfunded mandates. This action will not

result in additional expenditures by State, local, or tribal governments or by any members of the private sector. Therefore, MARAD has not prepared an assessment pursuant to the Unfunded Mandates Reform Act.

Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), a person is not required to respond to a collection of information by a federal agency unless the collection displays a valid OMB control number. This rulemaking amends an existing regulation without any change to the contemplated submission of information which might otherwise result in a change to the applicant's burden hours. Therefore, the rulemaking can rely on the existing information collected under OMB control number 2133-0018. Information submitted by applicants to the program will continue to be used to evaluate an applicant's project and capabilities, make the required determinations, and administer any agreements executed upon approval of loan guarantees.

List of Subjects in 46 CFR Part 298

Obligation guarantees.

For the reasons described in the preamble, the Maritime Administration amends 46 CFR part 298 to read as follows:

PART 298—OBLIGATION GUARANTEES

Subpart B – Eligibility

1. The authority citation for 46 CFR part 298 is revised to read as follows:

Authority: 46 U.S.C. chapter 537; 49 CFR 1.93.

2. Amend § 298.13 by revising the introductory text of paragraph (d), paragraph (d)(2)(ii), the introductory text of paragraphs (d)(3) and (e), and paragraphs (e)(3)(i) and (f) through (i) to read as follows:

§ 298.13 Financial requirements.

(d) *Financial definitions.* For the purpose of this section and §§ 298.35, 298.36, and 298.42 of this part:

(2) ***

(ii) In determining current liabilities, you must deduct any excess of unterminated voyage expenses over unterminated voyage revenue.

(3) “Equity” or “Net Worth” means, as of any date, (the total of paid-in-capital stock, paid-in surplus, earned surplus, retained earnings, and appropriated surplus,) and all other amounts that would be included in net worth in accordance with GAAP, but does not include:

(e) *Applicability.* The financial resources must be adequate to meet the financial terms MARAD requires pursuant to paragraph (f) of this section.

(3) ***

(i) A pro forma balance sheet at the time of the application; and

(f) *Financial requirements at Closing.* As a condition of disbursement of a guaranteed loan, the Company must demonstrate financial performance that supports a reasonable prospect of repayment taking into account foreseeable negative economic conditions.

(1) The financial requirements of this section are applicable to Companies qualifying under one of the following three categories:

(i) Owner as vessel operator, where the owner is to be the vessel operator;

(ii) Lessee or charterer as operator, where the lessee or charterer is to be the vessel operator; or

(iii) Owner as general shipyard facility, where the owner of a shipyard project is a general shipyard facility.

(2) Qualifying financial performance will be substantiated by financial results over at least the trailing 12 quarters and/or demonstrated by pro-forma financial performance that is underpinned by reasonable assumptions.

(3) Qualifying creditworthiness will be substantiated by reviewing and evaluating applicants based on revenue metrics which include the following non-exhaustive list:

- (i) Market factors;
- (ii) Strategic positioning;
- (iii) Management and governance;
- (iv) Pro-forma financial strength;
- (v) Project specific factors; and
- (vi) Loan terms.

(g) *Adjustments to financial requirements at Closing.* If the owner, although not operating a vessel, assumes any of the operating responsibilities, MARAD may adjust the financial requirements of the owner and operator by increasing the requirements of the owner and decreasing those of the operator.

(h) *Subordinated debt considered to be equity.* With MARAD approval, part of the equity requirements applicable under paragraph (c) of this section may be satisfied by debt, fully subordinated by a subordination agreement with MARAD, as to the payment of principal and interest on the Secretary's Note and any claims secured as provided for in the Security Agreement or the Mortgage. Repayment of subordinated debt may be made only from funds available for payment of dividends or for other distributions, in accordance with requirements of the Title XI Reserve Fund and Financial Agreement (described in section 298.35). Such

subordinated debt must not be secured by any interest in property that is security for Guarantees under Title XI, unless the obligor and the lender enter into a written agreement approved by MARAD. The written agreement must provide, among other things, that if any Title XI financing or advance by us to the obligor occurs in the future, such security interest of the lender must become subordinated to any indebtedness to MARAD incurred by the obligor and to any security interest obtained by MARAD in that property or other property, with respect to the subsequent indebtedness.

(i) *Modified requirements.* MARAD may waive or modify the financial terms or requirements otherwise applicable under sections 298.35 and 298.42, upon determining that there is adequate security for the guarantees or that such waiver or modification is in the best interests of the United States. MARAD may impose similar financial requirements on any person providing other security for the guarantees.

Subpart C - Guarantees

§ 298.21 [Amended]

3. Amend § 298.21, in paragraph (b)(1), by removing the word “Equity” and adding in its place the word “equity”.

4. Amend § 298.22 by revising paragraph (b) to read as follows:

§ 298.22 Amortization of Obligations.

(b) Usually, the payment of principal (amortization) must be made semi-annually, but in no event less frequently than on an annual basis, and in either case the amortization must be in equal payments of principal (level principal), unless MARAD approves the periodic payment of a constant aggregate amount, comprised of both interest and principal components that are variable in amount (level payment). No other method of amortization will be allowed that would reduce the amount of periodic amortization below that determined under the level principal or level payment basis at any time prior to maturity of the obligations, except where a third-party expert

approved or engaged by MARAD conducts an independent analysis and review of a project and structure of an obligation and demonstrates that such other method is in the best interests of the United States.

Subpart D – Documentation

5. Amend § 298.35 by revising the introductory text of paragraphs (b)(2) and (d) to read as follows:

§ 298.35 Title XI Reserve Fund and Financial Agreement.

(b)***

(2) Supplemental covenants which may become applicable. Unless, after giving effect to such transaction or transactions, during any fiscal year of the Company, the Company must remain in compliance with financial terms and requirements specified by MARAD based on the agency's evaluation for financial performance and creditworthiness and appropriate to protect the interest of the United States. The Company must not, without prior MARAD written consent:

(d) Deposits. Unless the Company, as of the close of its accounting year, was subject to and in compliance with the financial terms required by paragraph (b)(2) of this section, the Company must make one or more deposits to MARAD to be held by the Depository (the Title XI Reserve Fund), as further provided for in the depository agreement. The amount of deposit for any year, or period less than a full year, where applicable, will be determined as follows:

(Authority: National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, 46 U.S.C. chapter 537, 49 CFR 1.93(a))

By order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,
Secretary, Maritime Administration.

